United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

104 MD.

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1913.

No. 2612.

77

No. 19, SPECIAL CALENDAR.

LEE HUTCHINS, APPELLANT,

vs.

WALTER STILSON HUTCHINS AND CHARLES L. FRAILEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1913.

In the Court of Appeals of the District of Columbia.

No. 2612.

LEE HUTCHINS, Appellant,
vs.
WALTER STILSON HUTCHINS et al.

1 In the Supreme Court of the District of Columbia.

Adm. No. 18983.

In re Estate of STILSON HUTCHINS, Deceased.

Now come Walter Stilson Hutchins and Charles L. Frailey, the Caveatees in the matter of the Caveat filed in this cause by Lee Hutchins to the petition for the probate of the will of Stilson Hutchins, deceased, and move the court that a Commission be issued out of this honorable court to John L. Griffiths, United States Consul General at London, England, to take orally at the office of the Consul General of the United States at London, England, on the 21st day of October, 1913, at 11 o'clock A. M., and at such adjourned sessions as may be necessary the testimony in the matter of the will of the aforesaid Stilson Hutchins, deceased, of certain witnesses resident or being in the United Kingdom of Great Britain and Ireland, said witnesses and their places of residence being more particularly stated as follows: Dr. J. S. Risien Russell, address No. 44 Wimpole Street, W., London, England; Dr. Herbert Challice Crouch, address St. Michael's Ascot, Berks, England; Emily Read, address Nurses Corporation, No. 8 New Cavendish Street, Portland Place, London, W., England, and Janet Gibson address Nurses Corporation, No. 8 New Cavendish Street, Portland Place, London, W., England.

And that a Commission also shall issue out of this Court to Frank H. Mason, United States Consul General at Paris, France, to take orally at the office of the Consul General of the United States at Paris, France, on the 29th day of October, 1913, at 11 o'clock

2 A. M. and at such adjourned sessions as may be necessary the testimony of certain witnesses resident or being in the Republic of France, said witnesses and their places of residence being more particularly stated as follows: Dr. Edmond Gros, Paris, France; Marie Marchand, No. 3 Rue Georges Ville, Paris, France, and Julia Houy, No. 90 Avenue Kleber, Paris, France.

And for cause therefor the Caveatees state:

1. That the witnesses whose testimony it is desired to take are competent and material witnesses to said cause and to the state of mind and health of the Testator Stilson Hutchins during the year immediately precedent to the execution of the will in contest, that the witnesses resident in England are the physician and nurses who attended Stilson Hutchins in that country in the year 1909, and the witnesses resident in France are the physician who attended Stilson Hutchins in France in the year 1909 and the concierge and attendant at the apartment where he resided in Paris in the year 1909, that said witnesses reside beyond the Seas and the Caveatee- will be deprived of testimony, material, pertinent and essential to a fair trial of the cause unless the deposition of said witnesses be taken.

2. That said depositions in the opinion of the Caveatee- and *his* counsel cannot be safely taken on written interrogatories and cross-interrogatories and that the full knowledge of the decedent possessed by the witnesses and a fair and impartial trial can be had the Caveatees and counsel believe only by the taking orally of the depositions of the witnesses aforesaid, and that any other than oral depositions would not result in the truth being fully and fairly elicited.

WALTER STILSON HUTCHINS,
CHARLES L. FRAILEY,
Caveatees.

R. ROSS PERRY,
E. H. THOMAS,
CHARLES H. MERILLAT,
Attorneys for Caveatees.

3 DISTRICT OF COLUMBIA, *ss:*

Walter Stilson Hutchins and Charles L. Frailey, Caveatees, and Charles H. Merillat, being first duly sworn, depose and say: That they and each of them have read the above motion by them subscribed, the said Walter Stilson Hutchins and Charles L. Frailey as Caveatees, and the said Charles H. Merillat as one of the attorneys for the Caveatees, and the statements contained therein on their personal knowledge are true and those stated on information and belief they believe to be true and they and each of them are of the opinion that a fair and impartial trial of said cause and the issues joined therein demand that the aforementioned depositions be taken orally.

WALTER STILSON HUTCHINS.
CHARLES L. FRAILEY.
CHARLES H. MERILLAT.

Subscribed and sworn to before me this 22nd day of September, 1913.

[NOTARIAL SEAL.]

N. M. BELL,
Notary Public, D. C.

My commission expires April 5, 1914.

To Messrs. William G. Johnson & Myer Cohen, Attorneys for Lee Hutchins, and
Messrs. Gittings and Chamberlin, Attorneys for Rose Keeling Hutchins:

GENTLEMEN: Please take notice that we will call up the above motion before Mr. Justice Clabaugh *of* the Justice presiding in Probate Court the 25th of September, 1913, at 10 o'clock A. M.
4 or so soon thereafter as counsel may be heard.

E. H. THOMAS
C. H. MERILLAT,
Attorneys for Caveatees.

(Endorsement: Motion for Commission to take foreign depositions. Filed Sep. 23, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

5 In the Supreme Court of the District of Columbia, Holding Special Term of Probate Court.

Adm'n. No. 18983.

In re Estate STILSON HUTCHINS, Deceased.

Rose Keeling Hutchins in answer to the petition filed in this cause on 22nd day of September, 1913, by Walter S. Hutchins and Charles L. Frailey for commissions to take certain depositions in England and France, says:

That she objects to the granting of such commissions on the following grounds:

1st. That the real purpose of this request is to gain delay in the trial of the issues in this cause, which after repeated delays caused by the Caveator and Caveatees, shown on the face of the Record, has been set for trial October 15, 1913.

2nd. That there is no showing why such commission was not sought until this late hour; that the caveat was filed the 12th day of June, 1912, and no steps taken to frame issues until October 31st, 1912, and then only after this respondent had filed a petition to speed the cause. And every step possible was taken by her to get an early trial. That on November, 1912, it was agreed by all counsel and Mr. Justice Gould, the case be set for trial February 17th, 1913, Counsel at that time suggesting that they could not get ready to try the case until then, as they might want to take depositions abroad. The case was not tried on February 17th, 1913, because the petitioners had for the purpose of delay taken an appeal from the order framing the issues, which this respondent, due to the failure of the caveator to act, was compelled to ask the Court of Appeals to allow her to intervene and move to dismiss, which petition was allowed and motion granted.

6 From November, 1912, up to the making of this motion, ten months, there has never been the slightest intimation of a wish to take any depositions abroad. And all of those named in

the motion and their relations with Stilson Hutchins in his life time were known to Walter S. Hutchins prior to his father's death.

3rd. That Stilson Hutchins was not in Europe after the month of December, 1909; that the will now in controversy was made in the District of Columbia, October 26, 1910; that in Cause 30,188 on the Equity side of the Court, Walter S. Hutchins, Lee Hutchins, the Caveator, and all others interested as heirs at law and next of kin of the decedent, were interpleaded and in that case there was exhibited a deed in trust executed March 7th, 1910, by Stilson Hutchins conveying all of his estate to William J. Dante, trustee, which act was held by the Court and conceeded by Walter S. Hutchins and Lee Hutchins to be a valid instrument, and that Stilson Hutchins at that time was competent to execute it. Consequently such evidence as is now sought is to- remote and would be so held on any trial of the issues framed.

4th. That by the statutes now in force in this jurisdiction, there is no power to grant commissions to take depositions of foreigners in their own country, but such testimony should, when competent, be elicited by interrogatories and cross-interrogatories transmitted under letter rogatory, as provided for by Section 1058 of the Code of the District of Columbia.

ROSE KEELING HUTCHINS,
Respondent.

GITTINGS & CHAMBERLIN,
Attorneys for Respondent.

I, Rose Keeling Hutchins, do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my knowledge are true and those stated upon information and belief I believe to be true.

ROSE KEELING HUTCHINS.

7 Subscribed and sworn to before me this 26″ day of September, 1913.

WILLIAM J. RYAN,
Notary Public, New York Co.

[NOTARIAL SEAL.]

(Endorsement: Answer of Rose Keeling Hutchins. Filed Sept. 27, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

8 In the Supreme Court of the District of Columbia, Holding a Probate Court.

Adm. No. 18983.

In re Estate of STILSON HUTCHINS, Deceased.

Order for Commission to Issue.

On motion of counsel for the caveatees in the above entitled cause it is by the Court this 6th day of October, 1913, ordered that a com-

mission issue in due form of law to John L. Griffiths, United States Consul General at London, England, to take the testimony orally of and to examine at the office of the said Consul General at Number 42 New Broad Street in the said City of London on Monday, the 10th day of November, 1913, at eleven o'clock A. M. and at such adjourned sessions as he may find necessary the following witnesses on behalf of the caveatees in the matter of the trial of the issues raised by the caveat to the probate of the will of the above named Stilson Hutchins, deceased, and heretofore framed by the Court, to wit: Dr. J. S. Risien Russell, address No. 44 Wimpole Street, W., London, England; Dr. Herbert Challice Crouch, address St. Nicholas, Ascot, Berks, England; Emily Read, address Nurses Corporation, No. 8 New Cavendish Street, Portland Place, London, W., England; and Janet Gibson, address Nurses Corporation, No. 8 New Cavendish Street, Portland Place, London, W., England.

It is further ordered that a commission issue in due form of law to Alexander M. Thackara, United States Consul General at Paris, France, to take the testimony orally of and to examine at the office of the said Consul General at Number 36 Avenue de l'Opera in the said City of Paris on Thursday, the 20th day of November, 1913, at
eleven o'clock A. M. and at such adjourned sessions as he
9 may find necessary the following witnesses on behalf of the
caveatees in the matter of the trial of the issues raised by the caveat to the probate of the will of the above named Stilson Hutchins, deceased, and heretofore framed by the Court, to wit: Dr. Edmund Gros, Julia Houy and Marie Marchand, all of the City of Paris, France, the address of the said Julia Houy being Number 90 Avenue Kleber, Paris, France, and the address of the said Marie Marchand being Number 3, Rue Georges Ville, Paris, France.

HARRY M. CLABAUGH,
Chief Justice.

(Endorsement: Order for Commission to issue. Filed Oct. 6, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

10 In the Supreme Court of the District of Columbia, Holding a Special Term for Probate Business.

No. 18983. Adm. Doc. 45.

In re Estate of STILSON HUTCHINS, Deceased.

The caveator Lee Hutchins, by his counsel, in open court excepts, prior to and at the time of the signing thereof, to the order of the Court of this 6th day of October, 1913, for the issuance of a commission to take the deposition orally of witnesses on behalf of the caveatees in London, England, and Paris, France, on the ground that the court is without jurisdiction to pass an order for the oral examination

of witnesses residing beyond the sovereignty of the United States, which exception is allowed by the Court.

HARRY M. CLABAUGH,
Chief Justice.

October 6, 1913.

(Endorsement: Exceptions on behalf of Caveator. Filed Oct. 6, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

11 Court of Appeals of the District of Columbia, October Term, 1913.

No. 409, Original Docket; Administration Docket, No. 18983.

In re Estate of STILSON HUTCHINS, Deceased.

On consideration of the petition filed herein praying the allowance of a special appeal from the order of the Supreme Court of the District of Columbia of October 6, 1913, It is by the Court this day ordered that said appeal be, and the same is hereby allowed.

Per MR. CHIEF JUSTICE SHEPARD,

October 9, 1913.

A true Copy.
Test:

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[COURT SEAL.]

(Endorsement: Order allowing Special Appeal. Filed Oct. 13, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

12 In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 18983. Adm. Doc. 45.

In re Estate of STILSON HUTCHINS, Deceased.

Assignment of Errors.

Now comes the appellant, Lee Hutchins, and assigns as error against the order passed October 6, 1913, directing commissions to issue to take depositions, the following:

1. The Court erred in authorizing commissions to issue to take depositions orally, instead of upon written interrogatories and cross-interrogatories to be filed in the cause and transmitted with the commission.

2. The Court erred in granting the said motion of appellees for issuance of said commissions.

J. J. DARLINGTON,
MYER COHEN,
WM. G. JOHNSON,
Counsel for Appellant.

(Endorsement: Assignment of Errors. Filed Oct. 13, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

13 In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 18983. Adm. Doc. 45.

In re Estate of STILSON HUTCHINS, Deceased.

The Register of Wills will please make up a transcript of record for the special appeal allowed by the Court of Appeals from the order entered herein on October 6, 1913, ordering commissions to issue to take depositions, wherein Lee Hutchins is appellant and Walter Stilson Hutchins and Charles L. Frailey are appellees, and include therein the following papers:

1. Motion of Walter Stilson Hutchins and Charles L. Frailey for the issuance of said commissions.
2. Order of the Court of October 6, 1913, granting said motion.
3. Exception of Lee Hutchins to said action of the Court allowed October 6, 1913.
4. Order of the Court of Appeals allowing appeal from said order.
5. Assignment of errors.
6. This designation of the record for appeal.

J. J. DARLINGTON,
MYER COHEN,
W. G. JOHNSON,
Counsel for Appellant.

Service of a copy of the above designation of record for appeal acknowledged this 13th day of October, 1913.

R. ROSS PERRY,
One of Counsel for Appellees.

(Endorsement: Designation of record for appeal. Filed Oct. 13, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

14 In the Supreme Court of the District of Columbia, Holding a Probate Court.

Adm. No. 18983.

In re Estate of STILSON HUTCHINS, Deceased.

Agreed Statement of Facts.

It is hereby agreed between counsel for the Caveator and the Caveatees in the above entitled cause that at the hearing before Mr. Chief Justice Clabaugh on the motion of the Caveatees to have a commission issue to the United States Counsel General at London to examine orally certain named witnesses for the Caveatees on the 21st day of October, 1913, and also to have a commission issue to the United States Consul General at Paris to examine orally certain named witnesses for the Caveatees on the 29th day of October, 1913, it was stated in open court by Mr. Myer Cohen, one of the attorneys for the Caveator, that he was authorized by Mr. Justice Wright holding criminal court No. 2 for the current year beginning October 1913 to say to Mr. Chief Justice Clabaugh that in view of the great number of Municipal appeals pending in that court which demanded prompt hearing by reason of the fact that they had been pending for a very long time, he would not take up the trial of any contested will cases before the first of January 1914.

It is further stipulated that according to the procedure obtaining in the Supreme Court of the District of Columbia uninterruptedly for many years issues in contested will cases are certified to the Justice holding criminal court No. 2 for trial, in accordance with the provisions of the Code of Laws for the District of Columbia.

15 At this hearing Mr. Cohen urged that the taking of the deposition should not be earlier than the 17th day of November, 1913.

Counsel for Caveatees insisted that no date later than the first day of November, 1913, should be set. Mr. Chief Justice Clabaugh, how-ver, set the 10th day of November, 1913, for the taking of the depositions in London and the 20th day of the same month for the taking of the depositions in Paris, and accordingly on the 6th day of October, 1913, signed the order which is of record directing said commissions to issue.

According to the aforesaid procedure the tentative date for the trial of issues in contested will cases is fixed by the Justice holding the Probate Court in order that some certain day may be named in the order of publication required by law and thereafter from time to time and especially during the vacation term of the court, further tentative dates are set from time to time, to avoid republication until the actual date of trial is fixed.

The order fixing the 15th day of October 1913 for the trial of the issues in the matter of the will of the late Stilson Hutchins was such tentative date inasmuch as the actual date for the trial under said procedure could not be set until the Justice holding criminal

court No. 2 before whom the same are to be tried had concurred in the day for trial.

The above facts were all submitted for consideration to Mr. Chief Justice Clabaugh before he signed the order directing the said commission to issue.

It is further stipulated that the above agreed statement of facts shall be included in the record upon the special appeal allowed by the Court of Appeals of the District of Columbia from the order of Mr. Chief Justice Clabaugh made in the above entitled cause on the 6th day of October, 1913.

R. ROSS PERRY,
E. H. THOMAS,
C. H. MERILLAT,
Counsel for Appellees.

J. J. DARLINGTON,
MYER COHEN,
WM. G. JOHNSON,
Counsel for Appellant.

(Endorsement: Agreed statement of facts. Filed Oct. 21, 1913. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

16 R. Ross Perry. R. Ross Perry Jr.

R. Ross Perry and Son, Attorneys at Law.

Fendall Building, Washington City, D. C.

Telephone Main 707. Cable Address, "Rosper."

In the Supreme Court of the District of Columbia, Holding a Probate Court.

No. 18,983. Adm. Doc. 45.

In re Estate of STILSON HUTCHINS, Deceased.

OCTOBER 14, 1913.

To the Register of Wills of the District of Columbia.

SIR:—In accordance with the provisions of Rule V. paragraph f., of the Court of Appeals of this District we hereby designate in addition to the designation furnished you by counsel for the caveator the following matters to be included in the transcript of record for the special appeal allowed by the Court of Appeals from the order entered in the above-entitled cause on October 6, 1913, ordering commissions to issue to take certain depositions:—

1. Answer of Rose Keeling Hutchins to the motion of Walter Stilson Hutchins and Charles L. Frailey, caveatees, for the issuance of said commissions.
2. Opinion of Mr. Chief Justice Clabaugh granting said order.

3. An Agreed statement of facts to be prepared and signed by counsel for caveator and caveatees of all facts which were considered by Chief Justice Clabaugh in the making of said order, this statement of facts to be prompt- filed if agreed to; otherwise application will be made to the Court to have such facts stated of record.

Very respectfully,

R. ROSS PERRY,
E. H. THOMAS,
CHARLES H. MERILLAT,
By R. R. P.
Counsel for Caveatees.

17 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, James Tanner, Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbering from 1 to 16, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 18,983 estate of Stilson Hutchins deceased, wherein Lee Hutchins is appellant, and Walter Stilson Hutchins and Charles L. Frailey are appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the Designations of counsel filed therein and made a part hereof, except as to the opinion of Mr. Chief Justice Clabaugh, no opinion of the Chief Justice having been filed.

I further certify, That a Special Appeal was allowed by order of the Court of Appeals on the 9th day of October, A. D. 1913.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 21st day of October, A. D. 1913.

[Seal Supreme Court of the District of Columbia.]

JAMES TANNER,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia Supreme Court. No. 2,612. Lee Hutchins, appellant, vs. Walter Stilson Hutchins et al. Court of Appeals, District of Columbia. Filed Oct. 21, 1913. Henry W. Hodges, Clerk.